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# **TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1925**

**No. 318** —

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**MAX HENKELS, APPELLANT,**

**vs.**

**THOMAS W. MILLER, AS ALIEN PROPERTY CUSTODIAN,  
AND FRANK WHITE, AS TREASURER OF THE UNITED  
STATES OF AMERICA**

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**APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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**FILED MARCH 17, 1925**

**(30,959)**



(30,959)

SUPREME COURT OF THE UNITED STATES.

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MAX HENKELS, APPELLANT,

*vs.*

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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### **Subpoena.**

THE PRESIDENT OF THE UNITED STATES OF AMERICA,  
to Thomas W. Miller, as Alien Property Custodian,  
and Guy S. Allen, as Treasurer of the  
United States of America, GREETING:

YOU ARE HEREBY COMMANDED to appear before the  
Judges of the District Court of the United States  
of America for the Southern District of New York,  
in the Second Circuit, to answer a bill of complaint  
exhibited against you in the said Court in a suit  
in equity, by Max Henkels, and to further do and  
receive what the said Court shall have considered  
in this behalf; and this you are not to omit under  
the penalty on you and each of you of Two hundred  
and fifty Dollars (\$250). 2

WITNESS, Honorable Learned Hand, Judge of the  
District Court of the United States for the Southern  
District of New York, at the City of New York,  
on the 1st day of April, in the year one thousand  
nine hundred and twenty-one, and of the Independence  
of the United States of America the one  
one hundred and forty-fifth. 3

ALEX. GILCHRIST, JR.,  
Clerk.

HIRSCH, SHERMAN & LIMBURG,  
Complainant's Solicitors,  
160 Broadway,  
New York City.

4

*Subpoena.*

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

(Seal)

ALEX. GILCHRIST, JR.,  
Clerk.

**Bill of Complaint.**

5

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,  
against

THOMAS W. MILLER, as Alien  
Property Custodian, and GUY  
S. ALLEN, as Treasurer of the  
United States of America,  
Defendants.

In Equity  
No. E 21-108.

6

*To the Honorable Judges of the District Court of  
the United States for the Southern District of  
New York:*

The complainant, Max Henkels, brings this, his bill of complaint, and respectfully shows to the Court:

FIRST: The complainant, Max Henkels, is a citizen of the United States of America, and is a

*Bill of Complaint.*

7

resident of the City, County and State of New York, and is not, nor at any time has he been, an enemy or the ally of an enemy of the United States within the meaning and purview of such terms as used and defined in the Trading with the Enemy Act, or in any act amendatory thereof or supplementary thereto, or in any proclamation or executive order issued by the President of the United States of America pursuant to the provisions of said Trading with the Enemy Act, or in any manner whatsoever.

SECOND: The defendant Thomas W. Miller is a citizen of the United States of America, and a resident of Washington, in the District of Columbia, and at all times since the 4th day of March, 1919, has been and now is the duly appointed Alien Property Custodian. 8

THIRD: The defendant Guy S. Allen is a citizen of the United States of America, and a resident of Washington, in the District of Columbia, and is the Treasurer of the United States of America.

FOURTH: That on and prior to the 18th day of June, 1918, one A. Mitchell Palmer was the Alien Property Custodian.

FIFTH: That on and prior to the 18th day of June, 1918, complainant was the owner of 2,298 shares of the common capital stock of International Textile, Inc., a Connecticut corporation, of the par value of \$100 each. 9

SIXTH: That on or about the 18th day of June, 1918, the said A. Mitchell Palmer, acting as such Alien Property Custodian, and claiming that such shares of capital stock were then owned by the co-

partnership of Alb. & E. Henkels, of Langerfeld, Germany, and that the said co-partnership Alb. & E. Henkels was an enemy within the meaning of the Trading with the Enemy Act, required complainant to transfer, assign and deliver the said shares, which then stood in the name of the complainant, to said A. Mitchell Palmer, as such Alien Property Custodian.

11

SEVENTH: That thereupon complainant, in compliance with said demand, did so convey, transfer and assign and deliver the said shares to said A. Mitchell Palmer, as such Alien Property Custodian, and that at the time of such conveyance, transfer, assignment and delivery the complainant claimed and gave notice to the said Alien Property Custodian that the said shares were not the property of said co-partnership Alb. & E. Henkels, but were the sole property of complainant, and that complainant was not an enemy or the ally of an enemy, within the provisions of the Trading with the Enemy Act, as amended, or in any manner whatsoever.

12

EIGHTH: That at or prior to said conveyance, transfer, assignment and delivery complainant duly presented his petition to said A. Mitchell Palmer, as such Alien Property Custodian, under and pursuant to the provisions of Section 7d of the Trading with the Enemy Act, requesting permission to deliver such shares of stock to him as such Alien Property Custodian, to be held, administered and accounted for as provided by law, preserving and reserving his rights thereto, and his claim that such shares or the proceeds derived from any sale thereof were his exclusive property, and to make any other claim thereto which he might be entitled to under the law; that the said petition was duly

*Bill of Complaint.*

13

granted by the said A. Mitchell Palmer in writing, and thereupon the said 2,298 shares were delivered by this complainant to the said A. Mitchell Palmer, as such Alien Property Custodian, under the circumstances hereinabove set forth, and not otherwise.

NINTH: That thereafter, and on or about the 26th day of March, 1919, the said A. Mitchell Palmer, as such Alien Property Custodian, sold the said 2,298 shares of stock, and the net proceeds of the sale thereof were paid over by him to the defendant Guy S. Allen, as Treasurer of the United States.

14

TENTH: That on or about the 2nd day of June, 1920, and before the commencement of this action, complainant duly made and filed with the Alien Property Custodian notice of his claim to the proceeds of the sale of the said 2,298 shares of stock in conformity with the provisions of Section 9 of the Trading with the Enemy Act, and duly made and filed with the Attorney General, in whom the President of the United States had vested all power and authority conferred upon the President, pursuant to the provisions of Section 9 of the Trading with the Enemy Act, his application for the allowance of said claim; that more than sixty days have elapsed since the filing of such claim, and of such application for allowance thereof, and neither the President of the United States, nor the said Attorney General, has ordered the allowance thereof.

15

WHEREFORE, complainant prays for a decree herein ordering and adjudging:

(1) That the said 2,298 shares of the common stock of International Textile, Inc., be declared and decreed to be the property of the complainant.

16

*Bill of Complaint.*

(2) That the defendant Guy S. Allen, as Treasurer of the United States of America, be directed to account for and pay over to the complainant the proceeds of the sale of said 2,298 shares of common stock of the International Textile, Inc., now in his possession or custody, together with any and all interest or income earned thereon.

(3) That the complainant have such further relief as may be proper in the premises.

HIRSCH, SHERMAN & LIMBURG,  
Attorneys for Complainant,  
Office & P. O. Address,  
160 Broadway, Manhattan,  
New York City.

17

UNITED STATES OF AMERICA,  
STATE OF NEW YORK,  
SOUTHERN DISTRICT OF NEW YORK,  
CITY AND COUNTY OF NEW YORK, } ss.:

MAX HENKELS, being duly sworn, says:

That he is the complainant herein; that he has read and knows the contents of the foregoing bill of complaint, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

18

MAX HENKELS.

Sworn to before me this  
31 day of March, 1921.

W. J. MAGEE,  
Notary Public.

Kings Co. No. 49, Reg. No. 2039.

Certificate N. Y. Co. No. 52, Reg. No. 2031.

Commission expires March 30th, 1922.

**Answer.**

19

**DISTRICT COURT OF THE UNITED STATES,****SOUTHERN DISTRICT OF NEW YORK.**

MAX HENKELS,  
Plaintiff,

v.

THOMAS W. MILLER, as Alien  
Property Custodian, and GUY  
F. ALLEN, as Acting Treasurer  
of the United States,  
Defendants.

Equity  
No. E 21-108.

20

**ANSWER TO THE BILL OF COMPLAINT.**

Now come the defendants, Thomas W. Miller, as Alien Property Custodian, and Guy F. Allen, as Acting Treasurer of the United States, separately and severally answering the bill of complaint, and for their separate and several answers say:

(1) They have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered First of the bill of complaint, and therefore demand strict proof thereof.

21

(2) They admit the averments of paragraph numbered Second of the bill of complaint, except in so far as the same alleges that Thomas W. Miller has been Alien Property Custodian since the 4th day of March, 1919, and to this these defendants say that the said Thomas W. Miller became the duly qualified and acting Alien Property Custodian on the 12th day of March, 1921.

(3-4) They admit the averments of paragraphs numbered Third and Fourth of the bill of complaint.

(5) These defendants have no knowledge or information sufficient to form a belief with respect to the averments of paragraph numbered Fifth of the bill of complaint, except as set forth in paragraph numbered Sixth herein, and therefore demand strict proof thereof.

23 (6) Answering the averments of paragraph numbered Sixth of the bill of complaint, these defendants say that on or about the 17th day of December, 1918, the Alien Property Custodian, acting under and pursuant to the terms and provisions of the Trading with the Enemy Act, the amendments thereto and the proclamations and executive orders issued thereunder, after investigation did determine that Alb. & E. Henkels, of Langerfeld, Westphalia, Germany, was an enemy within the purview and meaning of the said Act, the amendments thereto and the proclamations and executive orders issued thereunder, and that 2298 shares of the common capital stock of the International Textile, Inc., were owing or belonging to, held for, by, on account of, or for the benefit of, the said Alb. & E. Henkels, and thereafter he required the said shares of stock to be conveyed, transferred, assigned, delivered and/or paid to him as Alien Property Custodian, and the said shares were conveyed, transferred, assigned, delivered and/or paid to him as Alien Property Custodian, to be held, administered and accounted for pursuant to law. Thereafter the Alien Property Custodian, acting in accordance with law, sold the said shares of stock at public auction, and realized from the said sale a large amount of money, which was deposited by the Alien Property Custodian.



todian in the Treasury of the United States, in accordance with law, and said money is now held and administered by the Treasurer of the United States.

Further answering said averments, these defendants say that should the plaintiff herein establish any right to recover in this suit, these defendants will make a full and accurate accounting of all the money and other property involved in the suit, to the end that a just and equitable decree may be rendered.

(7) Answering the averments of paragraph numbered Seventh of the bill of complaint, these defendants admit that the plaintiff at the time the said shares of stock were conveyed, transferred, assigned and delivered to the Alien Property Custodian reserved his right to make claim to the property or the proceeds thereof, and that the plaintiff asserted at that time that he was not an enemy nor an ally of enemy within the purview and meaning of the Trading with the Enemy Act.

26

For further answer to the averments of the said paragraph, these defendants refer to their answer to paragraph numbered Sixth of the bill of complaint and adopt the same herein.

(8) They admit the averments of paragraph numbered Eighth of the bill of complaint.

27

(9) For answer to the averments of paragraph numbered Ninth of the bill of complaint, these defendants refer to their answer to paragraph numbered Sixth of the bill of complaint, and adopt the same as their answer to paragraph numbered Ninth.

(10) They admit the averments of paragraph numbered Tenth of the bill of complaint.

28

*Answer.*

And now having fully answered the bill of complaint, these defendants pray that they be dismissed with their costs in this behalf expended.

FRANCIS G. CAFFEY,  
United States Attorney,  
Solicitor for Thomas W. Miller, as  
Alien Property Custodian, and  
Guy F. Allen, as Acting Treasurer of the United States.

29

**Plaintiff's Notice of Motion.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treasurer of the United States of  
America,

Defendants.

E 21-108.

30

*Sir:*

PLEASE TAKE NOTICE that upon the annexed affidavit of Morris J. Hirsch, verified the 20th day of

*Plaintiff's Notice of Motion.*

31

March, 1924, and upon the process and pleadings herein, the decree herein dated the 6th day of July, 1921, the order herein dated January 10th, 1922, for satisfaction of said decree, the warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and upon all the proceedings herein, we shall move this Court at a stated term thereof, appointed to be held for the hearing of general motions at the United States Court House and Post Office Building, in the Borough of Manhattan, New York City, on the 25th day of March, 1924, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order

32

(a) naming a master to take and state the account of the defendants, as directed by said decree, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree;

(b) vacating and setting aside so much of the aforesaid order of January 10, 1922, and warrant for satisfaction whereon the same was entered, as satisfies or purports to satisfy the said decree of July 6, 1921, with reference to defendants' duty to account for the income or interest, if any, earned or accrued;

33

(c) vacating and setting aside so much of the receipt of the complainant bearing date the 28th day of November, 1921, and annexed to these papers as Exhibit "I," as releases or purports to release defendants from liability to account for income or interest, pursuant to the said decree of July 6, 1921; and

34

*Plaintiff's Notice of Motion.*

---

(d) granting such other and further relief as may be proper.

Dated, New York, March 20th, 1924.

Yours, etc.,

HIRSCH, SHERMAN & LIMBURG,  
Solicitors for Complainant,  
160 Broadway,  
Borough of Manhattan,  
New York City.

35 To:

WILLIAM HAYWARD, Esq.,  
United States Attorney,  
Solicitor for Defendants,  
U. S. Court House &  
Post Office Building,  
New York City.

36

**Affidavit of Morris J. Hirsch—For** 37  
**Plaintiff.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,

Defendants.

38

SOUTHERN DISTRICT OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

MORRIS J. HIRSCH, being duly sworn, deposes and says as follows:

I am counsel for the complainant herein.

This is a suit in equity brought under the provisions of Section 9 of the Trading with the Enemy Act, wherein the bill of complaint prays an accounting from the Treasurer of the United States of the proceeds of two thousand two hundred and ninety-eight (2,298) shares of the capital stock of International Textile, Inc., a Connecticut corporation, owned by complainant (an American citizen), which had been theretofore seized and sold by the Alien Property Custodian as being the property of an alien enemy, to wit, the firm of Alb. & E. Henkels of Langerfeld, Germany.

39

40

*Affidavit of Morris J. Hirsch.*

---

The cause was tried on July 5, 1921, before Hon. Charles M. Hough, Circuit Judge, sitting as District Judge. Upon the trial the following concession as to the amount of principal sum involved, and to which complainant would be entitled if the Court decided in his favor, was made on the record by counsel:

41 "IT IS CONCEDED that the property was sold on March 26th, 1919, and realized the sum of \$1,518,000.00, from which was deducted for the expenses of sale \$12,947.45, leaving a balance of \$1,505,052.55; from which there was deducted for administration expenses the sum of \$2,500.00, which left a balance of \$1,502,552.55 of which there has been paid to Mr. Henkels the sum of \$628,776.27, leaving a balance in the Treasury of \$873,776.28."

Thereafter and on July 6, 1921, a decree was signed in favor of the complainant, determining that complainant was an American citizen and not an enemy or ally of enemy, and that he was the owner of the stock which had been seized and sold by the Alien Property Custodian, and further directing:

42 "(3) That the defendant, Frank White, as Treasurer of the United States of America, be and he hereby is directed to account for and pay over to the complainant the proceeds of the sale of the said 2,298 shares of common stock of International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon."

No master was named in the decree, however, to take and state the said account.

A copy of said decree is hereto annexed, marked "Exhibit A."

On or about August 1, 1921, defendants appealed from said decree, but thereafter and on or about September 26, 1921, said appeal was dismissed by the Circuit Court of Appeals.

Thereupon, on behalf of the complainant, I took up with the Department of Justice the matter of the payment to the complainant of the proceeds of the sale of his stock. On or about October 27, 1921, I was advised that the Department had received from the Treasury a check to complainant's order for the sum of \$873,776.28, being the balance of the principal sum hereinbefore referred to. Thereupon I attended at the office of the Attorney General in Washington on October 29, 1921, accompanied by the complainant personally, and conferred there with Assistant Attorneys General Guy D. Goff, Adna R. Johnson, Jr., and Dean H. Stanley. The above-mentioned check for \$873,776.28 was tendered to the complainant in full satisfaction of the decree and at the same time he was requested, as a condition of receiving the check, to execute a general release and have a warrant for the satisfaction of the decree executed by me as one of his solicitors. I objected to such requirement because the proposed payment to complainant of only the balance of the principal sum would not be a full compliance with the decree which had provided for the payment of "income or interest, if any," earned on the fund, and claimed that inasmuch as the principal sum, while on deposit in the Treasury, had been invested pursuant to the provisions of the Trading with the Enemy Act and Executive Order issued thereunder, the complainant was entitled to have allocated to him a proportionate share of the actual income earned, and, therefore, I tendered to

44

45

47 them at that time a proposed form of release which I had prepared and which would fully release the Alien Property Custodian and the Treasurer from all liability as to the principal sum while preserving complainant's right to an accounting for any interest or income earned thereon as directed by the decree. The form of release prepared by the Attorney General is hereto annexed, marked "Exhibit B," and the form tendered by me on behalf of complainant is hereto annexed, marked "Exhibit C." The substantial difference between the two forms was that the Attorney General's form was a complete release, whereas mine was a release for the principal sum without prejudice to complainant's claim to the income.

48 I urged that this was not a case where enemy owned property had been sold and the proceeds invested and income derived by the Government, nor was it a case in which I was asking for interest as such upon the fund, but, on the contrary, inasmuch as by the decree it had been declared that the stock had always been the property of the complainant, an American citizen, who was not an enemy or ally of an enemy, its seizure had been wrongful, and regardless of the deduction of the expenses of sale and costs of administration (which we were willing to waive), complainant was entitled by the terms of the decree itself to an accounting for any income or interest earned on the principal.

The matter was left for official determination with Assistant Attorney General Goff, who took the matter under advisement. In order to have before the Department of Justice a record of complainant's position, I left with Mr. Goff a letter addressed to the Attorney General dated October 29th, 1921, a copy of which is hereto annexed,



marked "Exhibit D." The form of release therein referred to as being attached is the one above referred to, whereof copy is annexed hereto as "Exhibit C."

After my return to my office in the City of New York, I prepared a memorandum for submission to the Attorney General. Copy of the letter of transmittal is hereto annexed, marked as "Exhibit E." Under date of November 5th, 1921, I received a communication from the Attorney General of which copy is hereto annexed, marked "Exhibit F."

On November 14, 1921, I telegraphed the Attorney General that inasmuch as the complainant contemplated an absence from the United States, I deemed it advisable to have both forms of release executed before his departure and requested the Department to send me its forms, and on the same day the Department mailed me a form of release in the form of "Exhibit B" above referred to and hereto annexed and warrant for satisfaction of decree, requesting the execution of the release in triplicate by complainant and execution of the warrant in triplicate by me as complainant's solicitor.

Not hearing from the Attorney General for four weeks, I wrote his assistant under date of December 12, 1921, inquiring as to the conclusion reached by him, copy of said letter being hereto annexed, marked "Exhibit G," and in reply was informed by letter dated December 21st, 1921, that the Department would refuse to deliver the check against any form of receipt or release other than that theretofore prepared by it (being the form of "Exhibit B" hereto annexed). A copy of the Department's said letter of December 21st, 1921, is hereto annexed, marked "Exhibit H." Inasmuch as the complainant could not secure payment of the principal to which he was concededly entitled without comply-

ing with those requirements, he was compelled to accede. Having theretofore executed both forms of release so as to have both available, complainant authorized me to deliver to the Attorney General the release demanded by the Attorney General, and also authorized me to execute and acknowledge the warrant for satisfaction of the decree, which was antedated November 28th, 1921, but was actually executed on the date of its acknowledgment, viz., December 30th, 1921.

Such release and warrant for satisfaction were accordingly mailed by me to the Attorney General on December 30th, 1921. Copies of said release and warrant are hereto annexed, marked "Exhibit I" and "Exhibit J" respectively. Said release and warrant were so executed and delivered solely because the Department of Justice explicitly declined to pay over the principal under the decree unless complainant and his solicitor would execute and deliver the said papers on the Department's prescribed forms.

Thereupon and on or about January 6th, 1922, I received from the Attorney General the check for \$873,776.28, dated October 21st, 1921, the same having in the meantime been held in the Attorney General's office pending the determination of the Department on the question of the form of the release required.

On January 10, 1922, the United States Attorney for this District filed the warrant for satisfaction of the decree and obtained an ex parte order thereon, satisfying the decree of July 6th, 1921, copy thereof being hereto annexed, marked "Exhibit K."

Complainant has never had any accounting from the defendants for the interest or income earned on the proceeds of the sale of his stock.

*Affidavit of Morris J. Hirsch.*

55

The conceded gross proceeds of the  
 sale is the sum of..... \$1,518,000.00  
 From this sum there had been de-  
 ducted for expenses of the sale.... 12,947.45

---

and the balance deposited in the  
 United States Treasury in March,  
 1919, is the sum of..... \$1,505,052.55  
 which sum remained on deposit in the  
 Treasury until March, 1921, when  
 there was charged for expenses of  
 administration..... 2,500.00

---

Leaving a balance of..... \$1,502,552.55  
 In March, 1921, there had been paid  
 to the claimant on account of prin-  
 cipal the sum of..... 518,776.27

---

Leaving the then balance..... \$ 983,776.28  
 which remained on deposit until April,  
 1921, when there was paid to the  
 claimant further on account of the  
 principal the sum of..... 110,000.00

---

Leaving..... \$ 873,776.28

which was paid to complainant in January, 1922.

56

57

On December 12, 1923, the United States Senate  
 passed a resolution, requesting the Alien Property  
 Custodian to transmit information as to accrued  
 interest under the Trading with the Enemy Act,  
 pursuant to which defendant Miller, the Alien  
 Property Custodian, made a report on December  
 15, 1923, a copy of which is hereto annexed, marked  
 "Exhibit I," from which it appears that the sum  
 of \$27,009,812.14 of interest had accrued in the

58

*Affidavit of Morris J. Hirsch.*

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Treasury prior to March 4, 1923, on money deposited under the terms of the Trading with the Enemy Act with the Secretary of the Treasury.

59

It therefore now appears that interest or income was in fact earned by the Treasury upon complainant's funds or some portion thereof whilst held therein and that complainant is entitled to an accounting from defendants under the decree herein, upon which accounting it can be determined whether he is entitled to any part of said sum of \$27,009,812.14 and any additions thereto held by defendant White as Treasurer, and as the warrant for satisfaction of the decree in full and the release in full were exacted of complainant as an indispensable condition of his receiving the principal sum to which he was concededly entitled under the decree, I respectfully ask, on complainant's behalf, that a Master be appointed so that accounting may proceed, and that said receipt or release and said warrant and order for satisfaction be set aside in so far as they apply to the interest or income which is to be the subject of such accounting.

MORRIS J. HIRSCH.

Sworn to before me this  
20 day of March, 1924.

60

EBEN C. GOULD,  
Notary Public,  
(Seal) Kings County.

Clerk's No. 355, Register's No. 5107.  
Certificate filed in New York County.  
Clerk's No. 237, Register's No. 5253.  
Commission expires March 30, 1925.

**Plaintiff's Exhibit A.**

61

At a Stated Term of the District Court of the United States in and for the Southern District of New York, held in the Federal Court Rooms, in the Woolworth Building, 233 Broadway, in the Borough of Manhattan, City of New York, on the 6th day of July, 1921.

Present:

Hon. CHARLES M. HOUGH,  
*Circuit Judge.*

62

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,  
Defendants.

63

This cause came on to be heard at this term upon the pleadings and proofs of the respective parties, and was argued by counsel and all process and pleadings were amended on the trial by substituting Frank White as Treasurer of the United States of America as party defendant in the place and stead of Guy S. Allen, and thereupon, upon consideration thereof and on motion of Hirsch, Sherman & Limburg, solicitors for the plaintiff, it is

64 *Plaintiff's Exhibit A—Decree of July 6, 1921.*

---

ORDERED, ADJUDGED AND DECREED as follows:

65 (1) That complainant is a citizen of the United States of America, and at the time of the commencement of this action was and still is a resident of the City, County and State of New York, and is not nor at any time has he been an enemy or ally of an enemy of the United States within the meaning and purview of such terms as used and defined in the Trading with the Enemy Act, or in any act amendatory thereof or supplemental thereto, or in any proceeding or executive order issued by the President of United States of America pursuant to the provisions of said Trading with the Enemy Act.

(2) That on the 18th day of June, 1918, complainant was the sole owner of 2298 shares of the common stock of International Textile, Inc., which shares were on the said 18th day of June, 1918, transferred and delivered by complainant to the Alien Property Custodian upon his demand and which were thereafter sold by the said Alien Property Custodian, and the proceeds of such sale were deposited in the United States Treasury in accordance with the provisions of the Trading with the Enemy Act.

66 (3) That the defendant Frank White, as Treasurer of the United States of America, be and he is hereby directed to account for and pay over to the complainant the proceeds of the sale of the said 2298 shares of common stock of International Textile, Inc., now in his possession or custody, together with the income or interest, if any, earned thereon.

CHARLES M. HOUGH,  
*U. S. Circuit Judge.*

Consented to as to form

WM. HAYWARD,

U. S. Attorney,

Southern District of New York,

Solicitor for Defendant.

**Plaintiff's Exhibit B.**

67

Receipt of MAX HENKELS for payment made pursuant to a decree of the United States District Court for the Southern District of New York, entered July 6, 1921.

---

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congress known as the "Trading-with-the-Enemy Act," as amended, Max Henkels has heretofore brought suit in the United States District Court for the Southern District of New York against Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, to establish his claim to certain moneys held by the Treasurer of the United States, taken by the Alien Property Custodian as the property of Alb. & E. Henkels; and

68

WHEREAS, the United States District Court, for the Southern District of New York, has entered a decree in said suit under date of July 6, 1921, ordering the Treasurer of the United States to pay to Max Henkels the proceeds of the sale of 2298 shares of common stock of International Textile, Inc., now in his possession or custody,

NOW, THEREFORE, in consideration of the premises, the undersigned, Max Henkels, the complainant in said suit, does hereby acknowledge receipt from the Treasurer of the United States of the money ordered by said decree to be paid by the Treasurer of the United States, as follows, to wit:

69

Cash in the sum of \$873,776.28 (Eight hundred seventy-three thousand seven hundred seventy-six and 28/100 dollars) paid pursuant to said decree.

And the undersigned does hereby further acknowledge and accept such sum as a full compliance with and satisfaction of said decree.

70

*Plaintiff's Exhibit B—Form Receipt.*

IN CONSIDERATION of the premises, the undersigned does hereby release and forever discharge the President of the United States, the Treasurer of the United States, Frank White, individually and as Treasurer of the United States, Guy F. Allen, individually and as acting and Assistant Treasurer of the United States, John Burke, individually and as Treasurer of the United States, Thomas W. Miller, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, A. Mitchell Palmer, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which the undersigned may have, based upon or arising out of said suit or said decree in said suit.

71

WITNESS the signature of the undersigned  
..... at .....  
on the.....day of.....192.

.....  
Signature

Witness:

72

.....  
.....



*Plaintiff's Exhibit B—Form Receipt.*

73

STATE OF  
COUNTY OF

} ss.:

On this.....day of.....in the  
year 192 , before me personally came.....  
.....to me known, and known to me  
to be the person described in and who executed the  
foregoing instrument, and acknowledged to me that  
said instrument is his voluntary act and deed.

.....  
Notary Public

74

**Plaintiff's Exhibit C.**

WHEREAS, in an action brought in the District  
Court of the United States, for the Southern Dis-  
trict of New York, wherein Max Henkels is plain-  
tiff and Thomas W. Miller, as Alien Property Cust-  
odian, and Frank White, as Treasurer of the  
United States of America, are defendants, a decree  
was duly made and entered on the 6th day of July,  
1921, a copy of which is hereto annexed, pursuant to  
which decree there has been paid over to Max  
Henkels, the plaintiff in said action, the sum of  
\$873,776.28.

75

NOW, THEREFORE, in consideration of the prem-  
ises, I, MAX HENKELS, do hereby acknowledge pay-  
ment to me by the Alien Property Custodian and  
the Treasurer of the United States, as follows, to  
wit: Check of the Treasurer of the United States  
for the sum of \$873,776.28 drawn to the order of  
Max Henkels from the account of Alb. & E.  
Henkels, Trust #23627, and I do hereby further  
acknowledge and accept such money as a full com-

76

*Plaintiff's Exhibit C—Form of Receipt.*

pliance with said decree with respect to the balance of the principal sum realized by the Alien Property Custodian on the sale by him of 2298 shares of the capital stock of International Textile, Inc., heretofore sold by the Alien Property Custodian as the property of the alien enemy firm of Alb. & E. Henkels of Langerfeld, Germany.

77

IN CONSIDERATION of the premises I do hereby release and forever discharge the President of the United States, the Treasurer of the United States, A. Mitchell Palmer, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, Thomas W. Miller, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which I may have, based upon or arising out of any and all money or other property paid to or received by the Alien Property Custodian or by the Treasurer of the United States as the money or other property owing or belonging to, or held for, by, on account of or on behalf of, or for the benefit of said firm of Alb. & E. Henkels to the extent only of the sum of Eight hundred seventy-three thousand seven hundred seventy-six and 28/100 dollars (\$873,776.28) aforesaid, and without prejudice to my claim for the income or interest, if any, earned upon the net proceeds of the sale of the said stock, to wit, the sum of One million, five hundred and five thousand, fifty-two and 55/100 dollars (\$1,505,052.55).

78

And without limiting the generality of the foregoing I do further release and forever discharge them in respect to anything done or omitted in pursuance of any order, rule or regulation made by

*Plaintiff's Exhibit C—Form of Receipt.*

79

the President under the authority of the Trading  
with the Enemy Act.

WITNESS my hand and seal at the City of New  
York on the            day of October, 1921.

..... (L. S.)

Witness:

.....

**Plaintiff's Exhibit D.**

80

MJH-MHP

October 29, 1921.

The Honorable,  
The Attorney General,  
Washington, D. C.

Dear Sir:

MAX HENKELS VS. ALIEN PROPERTY CUSTODIAN  
AND THE TREASURER OF THE UNITED STATES

Reference is made to the decree entered in this  
action which provides as follows:

"That the defendant Frank White, as Treas-  
urer of the United States of America, be and  
he is hereby directed to account for and pay  
over to the complainant the proceeds of the  
sale of said 2,298 shares of common stock of  
International Textile, Inc., now in his posses-  
sion or custody *together with the income or  
interest, if any, earned thereon.*"

81

It is conceded that the balance of principal of  
the proceeds of the sale now in the hands of the

82 *Plaintiff's Exhibit D—Letter of October 29, 1921.*

---

Treasurer is the sum of \$873,776.28. The sale of the stock involved in this action yielded originally the sum of \$1,505,052.55 which was on deposit in the United States Treasury since March, 1919, until March and April, 1921, when payments made on account reduced the principal sum to the amount of \$873,776.28. For this sum a check has been drawn by the Treasurer and forwarded to your office for delivery to the plaintiff. On application for the check it was insisted that the plaintiff should execute a general release, and in the event of his refusal to do so, the principal conceded sum would not be paid to him. I need only refer you to the provisions of Section 9 of the Act and to Executive Order No. 2813, subdivision 5, on the question which has been raised as to whether or not under the terms of the decree and the terms of the Act and the Executive Order, plaintiff would be entitled to receive any income which had been earned upon his funds. I contend that plaintiff is entitled to any income earned upon the funds and your Department contends that he is not, inasmuch as the funds were invested by the Treasurer in United States Securities pursuant to the Act and the Executive Order, and in view of the decision in the case of *U. S. vs. Bayard*, 127 U. S. 251. This, in my judgment, presents a debatable question and much can be said on both sides, and it is not my purpose to burden you with an argument on the question at this time. I therefore propose that the plaintiff be paid the balance conceded to be due on the principal sum (he waiving all inquiry as to disbursements made by the Government in connection with the sale of his property and the administration expense) and that there be reserved to him the right to put forward his claim to the income earned upon the principal fund, and with

83

84

Plaintiff's Exhibit D—Letter of October 29, 1921. 85

this in view, I have prepared the form of a release to be executed by him which I attach hereto. The Department's objection to such a release is that it will not definitely dispose of the decree and be a complete satisfaction of record. On the other hand, if it should transpire in other cases which may conceivably arise that income is allowable in like circumstances, the insistence of the Department that a complete general release be now had would foreclose the plaintiff from asserting his claim to his manifest detriment, and I submit therefore, inasmuch as no prejudice will ensue, that the form of release submitted by me should be acceptable to the Department, and this I believe would be as much for the benefit of your Department as for the benefit of the plaintiff, as it would be my purpose to institute appropriate proceedings as speedily as possible for the purpose of having this question judicially passed upon and set it at rest for all time. 86

The Department has suggested that I institute proceedings to settle this question before the payment to the plaintiff of the principal sum. In this suggestion I do not think that I should be called upon to acquiesce for the reason that the plaintiff would be deprived of this large sum of money indefinitely until final determination by the Court of Last Resort; whereas if he were paid the principal, he would have the use of the money in the interim which at simple interest would be in the neighborhood of \$1000 per week, and I am sure the Department would not be astute to deprive him of the use of these funds pending the process of litigation. In view of these circumstances I respectfully urge that the matter be speedily disposed of by you. 87

Respectfully,  
(Sgd.) MORRIS J. HIRSCH.

**Plaintiff's Exhibit E.**

November 1, 1921

HENKELS VS. MILLER

To the Attorney General,  
Washington, D. C.

Dear Sir:

Herewith is memorandum with respect to the force and effect of Executive Order No. 2813, and also with respect to the disposition of moneys in the hands of the United States Treasurer deposited under the statute and executive orders.

89 I believe that sufficient is here presented upon which to base the contention that the *Bayard* case is not decisive upon the question which has arisen, or that at least the question is still fairly open.

Respectfully,

(Sgd.) MORRIS J. HIRSCH.

(Attention Mr. Johnson)

**Plaintiff's Exhibit F.**

91

DEPARTMENT OF JUSTICE  
OFFICE OF THE ASSISTANT TO THE  
ATTORNEY GENERAL  
Washington

November 5, 1921

HENKELS V. MILLER

Mr. Morris J. Hirsch,  
160 Broadway,  
New York City, N. Y.

Dear Sir:

92

I have your letter of the 31st ultimo. Your letter of the 29th ult. as well as your telephone communications with Mr. Johnson have been brought to my attention. As soon as the Attorney General can reach the matter to which you refer, he will give it his very best attention. You of course realize that the questions involving the threatened rail strike have taken most of his time the last two or three weeks and he is now confronted with the coal strike situation. You will agree with me that these matters are of such imminent importance that other questions of lesser moment must rest in abeyance. However, I again assure you that he will take care of your case just as soon as he possibly can.

93

Very cordially yours,

(Sgd.) GUY D. GOFF,  
Assistant to the Attorney General.

94

**Plaintiff's Exhibit G.**

December 12, 1921 X1

HENKELS VS. MILLER A. P. C.

Col. Guy D. Goff,  
Department of Justice,  
Washington, D. C.

My dear Sir,

Reference is made to your letter to me of date November 5, 1921.

95 Without desiring to appear unduly insistent, I would thank you to advise me if any conclusion has been reached by the Department with respect to the form of the release to be executed by plaintiff.

The courtesy of a reply will be duly appreciated.

With many regards,

Yours sincerely,

(Sgd.) MORRIS J. EIRSCH.

96



**Plaintiff's Exhibit H.**

97

DEPARTMENT OF JUSTICE  
Washington, D. C.

Refer to  
9-17-9

ARJ:PMD

December 21, 1921

Hirsch, Sherman & Limburg,  
160 Broadway,  
New York City.

IN RE HENKELS V. CUSTODIAN

Sirs:

98

Receipt is acknowledged of your recent letter in which you inquire the conclusion of the Department in respect to the form of release to be executed by plaintiffs.

You are respectfully advised that the Department has given this matter careful consideration and cannot see its way clear to accept any release other than that indicated to you at the hearing granted you in Washington.

Respectfully,

For the Attorney General  
GUY D. GOFF,  
Assistant to the Attorney General.

99

100

**Plaintiff's Exhibit I.**

Receipt of MAX HENKELS for payment made pursuant to a decree of the United States District Court for the Southern District of New York, entered July 6, 1921.

---

101

WHEREAS, pursuant to the provisions of Section 9 of the Act of Congress known as the "Trading-with-the-Enemy Act," as amended, Max Henkels has heretofore brought suit in the United States District Court for the Southern District of New York against Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, to establish his claim to certain moneys held by the Treasurer of the United States, taken by the Alien Property Custodian as the property of Alb. & E. Henkels; and

WHEREAS, the United States District Court, for the Southern District of New York, has entered a decree in said suit under date of July 6, 1921, ordering the Treasurer of the United States to pay to Max Henkels the proceeds of the sale of 2298 shares of common stock of International Textile, Inc., now in his possession or custody,

102

NOW, THEREFORE, in consideration of the premises, the undersigned, Max Henkels, the complainant in said suit, does hereby acknowledge receipt from the Treasurer of the United States of the money ordered by said decree to be paid by the Treasurer of the United States, as follows, to wit:

Cash in the sum of \$873,776.28 (Eight hundred seventy-three thousand seven hundred seventy-six and 28/100 dollars) paid pursuant to said decree.

And the undersigned does hereby further ac-

*Plaintiff's Exhibit I—Receipt, November 8, 1921.* 103

knowledge and accept such sum as a full compliance with and satisfaction of said decree.

IN CONSIDERATION of the premises, the undersigned does hereby release and forever discharge the President of the United States, the Treasurer of the United States, Frank White, individually and as Treasurer of the United States, Guy F. Allen, individually and as acting and Assistant Treasurer of the United States, John Burke, individually and as Treasurer of the United States, Thomas W. Miller, individually and as Alien Property Custodian, Francis P. Garvan, individually and as Alien Property Custodian, A. Mitchell Palmer, individually and as Alien Property Custodian, and all other persons exercising the authority of them or any of them, from any and all rights, claims and demands of every kind, character and description, whether joint or several, which the undersigned may have, based upon or arising out of said suit or said decree in said suit. 104

WITNESS the signature of the undersigned.....  
.....at New York City, N. Y. on the twenty-eighth day of November, 1921.

MAX HENKELS

Signature 105

Witness:

WALTER A. HIRSCH  
MORTIMER H. HESS

106 Plaintiff's Exhibit I—Receipt, November 8, 1921.

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

On this twenty-eighth day of November in the year 1921, before me personally came MAX HENKELS, to me known, and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that said instrument is his voluntary act and deed.

(Seal) HARRY F. MELA,  
Notary Public,  
New York County No. 377.  
N. Y. Co. Reg. No. 3310.  
Commission Expires Mar. 30, 1923.

167

108

**Plaintiff's Exhibit J.**

109

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

MAX HENKELS,  
Plaintiff,

vs.

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE, as Treasurer  
of the United States,  
Defendants.

---

Equity  
No. 21/108.

110

## WARRANT FOR SATISFACTION OF DECREE.

*To the Clerk of the District Court of the United  
States for the Southern District of New York:*

WHEREAS Max Henkels, the plaintiff herein, did on the 6th day of July, 1921, obtain a decree in the District Court of the United States for the Southern District of New York against Frank White, as Treasurer of the United States, directing him to account for and pay over to the plaintiff the proceeds of the sale of 2298 shares of the common stock of the International Textile, Inc., then in his possession or custody, together with the income or interest, if any, accrued thereon.

111

AND WHEREAS, the said Max Henkels has received satisfaction for the same; these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of

112      Plaintiff's Exhibit J—Satisfaction of Decree.

said decree and for your so doing, this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, we, as solicitors of record of the said Max Henkels, have hereunto set our hand and affixed our seal this 28th day of November, 1921.

HIRSCH, SHERMAN & LIMBURG,  
Solicitors for plaintiff,  
By MORRIS J. HIRSCH,  
A Member of the firm.

113

STATE OF NEW YORK, }  
COUNTY OF NEW YORK, } ss.:

114      BE IT REMEMBERED, that on this 30th day of December, 1921, before me, the subscriber, a Notary Public of the State of New York, personally appeared Morris J. Hirsch, a member of the firm of Hirsch, Sherman & Limburg, who, I am satisfied, is the person named in and executing the foregoing Indenture, and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein set forth.

(Seal)      LIONEL S. POPKIN,  
Notary Public,  
State of New York.  
Notary Public, N. Y. Co. Clerk's No. 317.  
Register's No. 3286.  
Commission expires March 30, 1923.  
My Commission expires.....

**Plaintiff's Exhibit K.**

115

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

<p style="text-align: center;">MAX HENKELS, Plaintiff,  against  THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States, Defendants.</p>	}	E 21/108.
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116

Upon reading and filing the annexed consent, and upon motion of William Hayward, United States Attorney, attorney for the defendants Thomas W. Miller, Alien Property Custodian, and Frank White, Treasurer of the United States, it is

ORDERED that the decree, heretofore entered herein and dated July 6, 1921, directing the defendant Frank White, Treasurer of the United States, to account for and pay over to the plaintiff the proceeds of the sale of 2,298 shares of the common stock of the International Textile, Inc., together with the income or interest, if any, accrued thereon, be and the same is hereby satisfied of record.

117

Dated, New York, January 10, 1922.

(Sgd.) J. M. MACK,  
U. S. C. J.

118

**Plaintiff's Exhibit L.**

68TH CONGRESS, {	SENATE.	{ DOCUMENT
1st Session. }		{ No. 10.

**ACCRUED INTEREST UNDER TRADING  
WITH THE ENEMY ACT.**

---

LETTER FROM THE ALIEN PROPERTY CUSTODIAN  
TRANSMITTING IN RESPONSE TO SENATE RESO-  
LUTION No. 49 OF DECEMBER 12, 1923, INFOR-  
MATION AS TO CERTAIN ACCRUED INTEREST UN-  
DER THE TRADING WITH THE ENEMY ACT.

119

December 18, 1923.—Referred to the Committee on  
Appropriations and ordered to be printed.

---

ALIEN PROPERTY CUSTODIAN,  
*Washington, December 15, 1923.*

The PRESIDENT OF THE SENATE,  
*Washington.*

SIR: I have the honor to acknowledge receipt of  
Senate Resolution No. 49, directing the Alien Prop-  
erty Custodian to submit to the Senate certain in-  
formation.

120 In answer to paragraph (a) of the resolution,  
you are advised that under date of November 7,  
1923, this office was informed by the Treasury De-  
partment that the sum of \$27,009,812.14 had ac-  
crued in the Treasury prior to March 4, 1923, on  
money deposited under the terms of the trading  
with the enemy act with the Secretary of the  
Treasury.

In answer to paragraph (b), there is no provi-  
sion under the trading with the enemy act, or any



*Plaintiff's Exhibit L—Letter of December 15, 1923.* 121

---

amendments thereto, providing for the payment of interest to an alien enemy when his or her property is returned under the provisions of said act.

In answer to paragraph (c), you are advised that the above sum, representing accrued interest, as well as the remaining alien property not subject to return under the act or amendments thereto, is awaiting such disposition as Congress may make thereof.

Replying specifically to paragraph (c), administrative difficulties are foreseen should accrued interest prior to March 4, 1923, be prorated and ordered distributed to each trust under which it was earned. 122

At one time there were approximately 50,000 active trusts administered by the Alien Property Custodian representing one or more persons. It seems to be impracticable to prorate the interest previous to March 4, 1923, in a proportionate share for each trust involved. The entire amount of alien property represented by cash in the Treasury has not been invested in full, due to the necessity of a cash balance on hand approximating \$5,000,000 at all times. It would be difficult to ascertain just which portion of this uninvested fund was taken from the respective trusts, which computation would be necessary, if the accrued interest were divided over a period of five and one-half years, during which time this fund has been invested and reinvested by the Treasury Department. 123

Respectfully yours,

THOMAS W. MILLER,  
*Alien Property Custodian.*

124 **Additional Affidavit of Morris J.  
Hirsch—For Plaintiff.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

against

125 THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,

Defendants.

In Equity  
No. 21-108.

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF NEW YORK, } ss.:  
COUNTY OF NEW YORK,

MORRIS J. HIRSCH, being duly sworn, says: I  
am one of the solicitors for the complainant herein.

126 In preparing the affidavit on this motion I neg-  
lected to set forth the proceedings in the Circuit  
Court of Appeals resulting in the dismissal of de-  
fendants' appeal, which said proceedings are of  
record in the Appellate Court, but not in this  
court.

The decree, as stated in the original affidavit,  
was rendered on July 6th, 1921. The assignments  
of error were filed and the appeal allowed and  
citation issued on August 1st, 1921. On Septem-  
ber 20th, 1921, I served notice of motion return-  
able on October 3rd, 1921 (the opening of the

*Affidavit of Morris J. Hirsch.*

127

October Term), to affirm the decree upon the ground that the appeal was frivolous, or in the alternative to advance the cause for immediate argument. Copy of the notice of motion is hereto annexed marked Exhibit M.

On September 26th, 1921, Mr. John Holley Clark, Assistant to the United States Attorney in this District, informed me by telephone that he had received instructions from the Attorney General's office in Washington to consent to a dismissal of the appeal without costs. Thereupon and on the same day a consent was signed accordingly and on the same day the order of dismissal was signed by one of the judges in the Circuit Court of Appeals. A copy of the said order of dismissal and of the consent subjoined thereto is hereto annexed marked Exhibit N. On the same day, to wit, September 26th, 1921, I served a certified copy of said order of dismissal on the United States Attorney for this District.

128

It was about a month later that the check to complainant's order was drawn and I was advised that it was ready for delivery as stated in my original affidavit.

(Sgd.) MORRIS J. HIRSCH.

Sworn to before me this

129

1st day of April, 1924.

EBEN C. GOULD,

Notary Public,

(N. S.) Kings County.

Clerk's No. 355, Register's No. 5107.

Certificate filed in New York County,

Clerk's No. 237, Register's No. 5253.

Commission expires March 30, 1925.

130

**Plaintiff's Exhibit M.**

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

MAX HENKELS,  
Plaintiff-Appellee,  
against

131 THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE, as Treasurer  
of the United States of Amer-  
ica,  
Defendants-Appellants.

No. 131  
October Term,  
1921.

*Sir:*

132 PLEASE TAKE NOTICE that upon the transcript of  
record on appeal from the decree in equity of the  
District Court of the United States for the South-  
ern District of New York, the undersigned will  
move this court at a stated term thereof to be held  
in the Post Office Building, in the Borough of  
Manhattan, City of New York, on the 3rd day of  
October, 1921, at 10.30 o'clock A. M. of that day,  
or as soon thereafter as counsel can be heard, to  
affirm the decree appealed from herein, on the  
ground that it is manifest from said transcript of  
record that the questions on which the decision  
of this cause depends are so frivolous as not to  
need further argument, or, in the alternative, to  
advance the cause for immediate argument upon  
the ground that the case is of such a character as  
not to justify extended argument, and for such

*Plaintiff's Exhibit M--Notice.*

133

other or further relief as to the court may seem just.

Dated, New York, September 20th, 1921.

Yours, etc.,

MORRIS J. HIRSCH,  
Counsel for Plaintiff-Appellee.

To:

WILLIAM HAYWARD, Esq.,  
Counsel for Defendants-Appellants.

134

**Plaintiff's Exhibit N.**

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

MAX HENKELS,  
Plaintiff-Appellee,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE, as Treasurer  
of the United States of Amer-  
ica,

Defendants-Appellants.

No. 131  
October Term,  
1921.

135

The defendants, Thomas W. Miller as Alien Property Custodian, and Frank White as Treas-

136

*Plaintiff's Exhibit N—Order.*

137

urer of the United States of America, having duly appealed to this court from the decree heretofore made by the District Court of the United States for the Southern District of New York, and entered in this cause on the 6th day of July, 1921, and the transcript of the record from said District Court having been duly filed in this court, and the appellee having duly entered his appearance herein, and having given notice of motion to affirm the decree so appealed from or to advance this cause for immediate argument and for further relief, returnable on the 3d day of October, 1921, and upon the subjoined consent of the counsel for the respective parties hereto, and on motion of Morris J. Hirsch, Counsel for Plaintiff-Appellee, it is now hereby

ORDERED, ADJUDGED AND DECREED by this court that the appeal of Thomas W. Miller as Alien Property Custodian and Frank White as Treasurer of the United States of America, defendants above named, from the final decree of said District Court made and entered in this cause on the 6th day of July, 1921, be and the same is hereby dismissed without costs to either party as against the other.

138

Dated, New York, September 26th, 1921.

C. M. HOUGH,  
C. J.

WE HEREBY CONSENT to the entry of this order.

Dated, New York, September 26, 1921.

MORRIS J. HIRSCH,  
Counsel for Plaintiff-Appellee.

WM. HAYWARD,  
Counsel for Defendants-Appellants.

**Affidavit of Dean Hill Stanley—For  
Defendants.**

139

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

VS.

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE, as Treasurer  
of the United States,  
Defendants.

Eq. 21-108.

140

DISTRICT OF COLUMBIA, SS.:

DEAN HILL STANLEY, being duly sworn, deposes  
and says as follows:

I am a Special Assistant to the Attorney General of the United States and as such represented Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States, in the above entitled cause.

After a decree had been entered in favor of the plaintiff and the appeal which had been prosecuted on behalf of the Custodian and the Treasurer, had been dismissed by consent of the parties by the Circuit Court of Appeals, it became my duty to take the necessary steps to effect a satisfaction of the final decree. To that end I dictated a letter to the Secretary of the Treasury enclosing a certified copy of the final decree and directing him to satisfy the provisions thereof, and to send to the

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Department a Treasury warrant for the amount covered by the decree. This letter was signed by Guy D. Goff, Assistant to the Attorney General. Thereafter in a letter dated October 27, 1921, and signed by S. P. Gilbert, Jr., Undersecretary of the Treasury, the Treasury Department transmitted to the Attorney General a check in the amount of \$873,776.28.

Thereafter, Morris J. Hirsch, Esquire, attorney for the plaintiff, was advised that the Department was prepared to satisfy the decree. To the best of my recollection, Mr. Hirsch came to my office in the Department of Justice for the purpose of receiving satisfaction of the decree. Thereupon I requested him to execute concurrently with the delivery of the check, a receipt for the amount and a warrant for the satisfaction of the decree. Mr. Hirsch, when advised of the amount of the check, stated that he was of the opinion that the check was insufficient in amount to satisfy the decree. He asserted that there was interest due to the plaintiff upon the principal amount of the recovery, in view of the fact that funds deposited in the Treasury of the United States by the Alien Property Custodian were invested and reinvested by the Secretary of the Treasury in Government securities.

I stated to Mr. Hirsch at that time that I did not believe that the law permitted the recovery by Mr. Henkels of any interest upon the principal amount of the decree, either from the United States or by reason of the fact that funds deposited by the Alien Property Custodian in the Treasury of the United States had, in part, been invested in interest bearing Government securities. I stated to Mr. Hirsch that I believed that the situation was fully covered by the case of *U. S. ex rel. Angarica*



*v. Bayard*, 127 U. S. 330. Furthermore, to the best of my recollection, I explained to Mr. Hirsch the method of investing the funds deposited by the Treasurer of the United States as aforesaid. This explanation was substantially the same as the facts set forth in the affidavit of Michael J. O'Reilly, verified April 3, 1924, and submitted herewith.

Thereupon Mr. Hirsch and I argued the matter at length without either of us being able to agree with the other, although Mr. Hirsch, to my best recollection, stated that it was an arguable point. I stated to Mr. Hirsch, at this time, that I was quite willing that the whole matter be submitted to the Court in the proper manner, in order that the Court might decide the controversy. Mr. Hirsch appeared unwilling to follow such a course. He requested that arrangements be made for him to argue the matter before Colonel Guy D. Goff, who was then Assistant to the Attorney General. These arrangements were made and Mr. Hirsch presented his views to Colonel Goff. I was present at the conference and stated what I considered to be the law. After due consideration and after submission of a memorandum of law by Mr. Hirsch, Colonel Goff sustained the view which I had asserted.

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Mr. Hirsch, during the discussions with Colonel Goff and me, and likewise with Mr. A. R. Johnson, Jr., Chief of the division in charge of matters arising under the Trading with the Enemy Act in the Department of Justice, offered to sign a release and warrant for satisfaction, reserving the right to take further action with respect to the recovery of interest. Mr. Hirsch was advised that the Department did not believe that it was compatible with the interest of the Government or of the proper handling of the case, to have the decree

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*Affidavit of Dean H. Stanley.*

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satisfied in part and leave open further questions thereunder.

I stated to Mr. Hirsch, as likewise did Colonel Goff, to my best recollection, that the Department was quite willing to co-operate with him in bringing the matter to a speedy hearing before the Court, if he so desired. Mr. Hirsch appeared to be unwilling to do this, and later Mr. Henkels executed a receipt and release in full and Mr. Hirsch executed the warrant for satisfaction of the decree, upon which the order referred to in his affidavit was entered.

(Sgd.) DEAN HILL STANLEY.

Subscribed and sworn to before me  
this 3rd day of April, 1924.

(Sgd.) JOS. P. RUDY,  
Notary Public, D. C.

My commission expires January 25, 1929.

**Opinion.**

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## UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,  
  
against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,  
  
Defendants.

E 21-108.

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Motion to set aside the release and satisfaction of decree executed by the plaintiff in the above-entitled suit. The suit was under Section nine of the Trading with the Enemy Act and resulted in an interlocutory decree adjudging the plaintiff to be an American citizen and the owner of certain shares of stock seized by the Alien Property Custodian on June 18, 1918, and afterwards sold under Section twelve. It further decreed that the defendants, the Alien Property Custodian and Treasurer of the United States, should account for the proceeds of the sale "together with the income or interest, if any, earned thereon." A controversy arose as to whether any such interest was earned, which the defendants denied. The plaintiff wished immediately to get the principal sum of the sale, i. e., \$873,776.28, the amount of which was agreed on, but which the defendants refused to pay with-

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out receiving a release in full and satisfaction of the decree. To this the plaintiff objected, asserting his right to receive the principal at once and later to litigate the question of the interest or income in an accounting under the interlocutory decree. Being unable to prevail, he yielded and gave the release and satisfaction required. The motion is based upon the theory that these documents were procured by duress and should be set aside and that the accounting should proceed.

MORRIS J. HIRSCH and HARRY F. MELA for the motion.

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DEAN HILL STANLEY opposed.

LEARNED HAND, D. J.:

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If the plaintiff had present right unconditionally to receive the principal, its retention by the defendants involved a loss to him arising from the defendants' wrong. The proceeds must under Section twelve be invested in United States securities and these I may take judicial notice bear a smaller interest than six per cent., the legal rate. Thus the delay in receiving the principal would have resulted in a loss to the plaintiff pending the accounting, assuming that the legal rate is a fair compensation for the use of money. Hence the plaintiff argues that he was subjected to a penalty in case he refused to give the release and satisfaction. I will not, because I need not, say that it would not be duress to exact the documents as a condition of immediate payment, if the principal was due. Perhaps the case so viewed may be within the doctrine of *Maxwell vs. Griswold*, 10 How. 242, *Robertson vs. Frank Bros. Co.*, 132 U. S. 17,

Edwards vs. Chile Copper Co., 273 Fed. Rep. 452 (C. C. A. 2), Swift Co. vs. U. S., 111 U. S. 22. But in those cases the payment was exacted to secure the release of property to which the plaintiff was absolutely and immediately entitled or to avoid a statutory penalty, or to prevent a business from being closed. Unless there be some such right the plaintiff has no case.

In the case at bar the plaintiff had no present right to the principal sum. In the first place the interlocutory decree did no more than give him an accounting on which the account had not yet been stated. True, the parties had agreed on the amount due for principal but that agreement did not create a present right or duty and the defendants would have had no warrant for the payment till the court had so ordered. Formally at any rate the necessary condition was lacking until the plaintiff had procured a decree for the payment of the principal.

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But the case does not stop there. No such decree could lawfully have been passed until the whole account was finally struck, including interest as well as principal. The statute is explicit on the duties of the defendants in this regard. Section twelve so far as relevant reads as follows: "If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the

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claimant or suit otherwise terminated." It is true that this provision was intended primarily to protect the claims of third persons, of whom the plaintiff is one, upon the fund, but it is none the less the rule and the only rule applicable to the payment of moneys out of the funds collected under the act in the absence of further action by Congress. It forbids any payment of the sums collected after suit commenced under Section nine except on order of the court in satisfaction of the final decree or other termination of the suit. The defendants had no lawful power to pay, and the plaintiff had no right to get, any part of the sum collected from the sale of the property until the suit had gone to final decree. Thus he was not unlawfully kept out of his money; the statute gave him the option, and only that, to take what the defendants would agree to give in final settlement, or to prosecute the accounting to final decree.

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Even if the defendants had wilfully refused, which they did not, to give him interest known to them to be due, his recourse was only to the court. The question whether any interest was earned at all in the sense that the law intended was possibly open to them even under the decree, but if not, and if, as the plaintiff says, the decree had foreclosed it, still the amount was open to genuine dispute and the defendants were in duty bound to insist on its liquidation by a court. Till it was liquidated the plaintiff had no rights whose denial could be the basis of a charge of duress. If he would get his past due interest, it was at the expense of suffering any loss involved in letting his principal meanwhile lie at a lower rate of interest. He might not consent to treat the decree as final by giving a satisfaction in full and still reserve his right later to litigate the question of interest.

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To set aside the satisfaction would make the payment of principal unlawful since it would then have been a payment without any final decree to support it, which is contrary to the statute.

The result is not so harsh as the plaintiff would have me think, though its harshness would be irrelevant if it existed. It was not unreasonable for Congress to insist that the payments should not be made piece-meal and that the whole fund should remain intact until finally disposed of by the court. After all, the security was the highest possible and the return was what the financial world deems adequate under such circumstances.

The motion is denied.

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May 15, 1924.

LEARNED HAND,  
*D. J.*

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**Decree.**

At a Stated Term of the United States District Court, for the Southern District of New York, held at the United States Court House and Old Post Office Building, in the Borough of Manhattan, New York City, in said District, on the 23rd day of May, 1924.

Present:

Honorable LEARNED HAND,  
*United States District Judge.*

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MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,

Defendants.

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This cause came on to be further heard at this Term and was argued by counsel and thereupon, upon consideration thereof, it was ORDERED, ADJUDGED AND DECREED, as follows, viz.: that the application of the complainant to name a master and have an accounting by the defendants as directed by the decree of July 6th, 1921, and to vacate and set aside the order of January 10th, 1922, the warrant for satisfaction of decree and the receipt or release of the complainant bearing date the 28th



day of November, 1921, in so far as said order, warrant and release apply to the interest or income mentioned in said decree (which said application was heard and determined upon affidavits in the form of a contested motion), be and the same is hereby in all respects denied.

LEARNED HAND,  
*U. S. District Judge.*

**Assignments of Error.**

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UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen); as Treas-  
urer of the United States of  
America,

Defendants.

In Equity  
No. 21-108.

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Now comes the complainant, Max Henkels, by Hirsch, Sherman & Limburg, his solicitors, and says that the decree in the above-entitled cause entered on the 23rd day of May, 1924, is erroneous and that in the record and proceedings and in the

*Assignments of Error.*

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decree aforesaid manifest error has intervened to the prejudice of said complainant, as follows, to wit:

1. The Court erred in denying the application of the complainant which was embraced in the complainant's notice of motion dated March 20th, 1924.
2. The Court erred in making a decree equivalent to the dismissal, upon pleadings and proofs, of a supplemental bill of complaint for the same relief as that sought by complainant's motion and prayed for in his notice of motion dated March 20th, 1924.
3. The Court erred in refusing to grant to complainant any relief in this cause.
4. The Court erred in refusing to name a master to take and state the account of the defendants, as directed by the decree of July 6th, 1921, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree.
5. The Court erred in refusing to direct that the accounting directed in and by said decree of July 6th, 1921, should now proceed.
6. The Court erred in refusing to vacate or set aside so much of the order of January 10th, 1922, for satisfaction of the said decree of July 6th, 1921, and warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and whereon the said order was entered, as satisfies or purports to satisfy said decree of July 6th, 1921,

with reference to defendant's duty to account for the income or interest, if any, earned or accrued.

7. The Court erred in refusing to vacate or set aside so much of the receipt or release of the complainant bearing date the 28th day of November, 1921, and annexed to complainant's motion papers as Exhibit "I," as releases or purports to release defendants from liability to account for income or interest pursuant to said decree of July 6th, 1921.

8. The Court erred in refusing to decree that said warrant for satisfaction of decree and receipt or release, in so far as the same apply to the interest or income mentioned in said decree of July 6th, 1921, were delivered by complainant to defendants involuntarily and under duress. 176

WHEREFORE, the said complainant prays that said decree of the United States District Court, for the Southern District of New York, entered in this cause on the 23rd day of May, 1924, be reversed and that the said Court may be directed to enter a decree in accordance with the prayer of said notice of motion.

Dated, New York, June 16th, 1924.

HIRSCH, SHERMAN & LIMBURG,  
Solicitors for Complainant,  
160 Broadway, New York City. 177

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**Appeal and Allowance.**

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,  
  
against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,  
  
Defendants.

In Equity  
No. 21-108.

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*To the Honorable, the Judges of the United States  
District Court, for the Southern District of  
New York:*

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Now comes the above named complainant, Max Henkels, by Hirsch, Sherman & Limburg, his solicitors, and feeling himself aggrieved by the decree of this Court entered on the 23rd day of May, 1924, denying his application to name a master and have an accounting by the defendants and to vacate and set aside a certain order, warrant and receipt or release, in so far as said order, warrant or release apply to interest or income, as in said decree more fully set forth, doth hereby pray that an appeal may be allowed to him from the said decree to the United States Circuit Court of Appeals, for the Second Circuit, for the reasons specified in the assignment of errors which is filed herewith, and that a transcript of the record, proceed-

*Appeal and Allowance.*

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ings and papers upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals, for the Second Circuit.

Dated, New York, June 16th, 1924.

HIRSCH, SHERMAN & LIMBURG,  
Solicitors for Complainant,  
160 Broadway, Manhattan,  
New York City.

The foregoing appeal is hereby allowed; bond \$250.

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Dated, New York, June 17th, 1924.

JNO. C. KNOX,  
*U. S. D. J.*

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**Bond on Appeal.**

This is a bond in the usual form, executed by complainant as principal and United States Fidelity & Guaranty Company as surety, dated June 14, 1924, in the penal sum of \$250, to defendants as obligees. The parties have waived the copying of said bond in full in this transcript.

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**Citation.**

*By the Honorable JOHN C. KNOX, One of the Judges of the United States District Court, for the Southern District of New York, in the Second Circuit.*

*To THOMAS W. MILLER, as Alien Property Custodian, and FRANK WHITE, as Treasurer of the United States of America, GREETING:*

185 YOU ARE HEREBY CITED and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be held at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, on the 17th day of July, 1924, pursuant to an appeal and allowance thereof filed in the Clerk's office of the District Court of the United States for the Southern District of New York, wherein Max Hensels is appellant and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

186 GIVEN UNDER MY HAND at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of June, in the year of our Lord one thousand nine hundred and twenty-four, and of the Independence of the United States the one hundred and forty-eighth.

JNO. C. KNOX,  
U. S. District Judge.

(Endorsed): Copy rec'd June 18/24. Wm. Hayward, U. S. Attorney A. C.

**Stipulation re Certification.**

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UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,  
Defendants.

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IT IS HEREBY STIPULATED that the foregoing printed copy is a true transcript of the record in the above entitled cause, as agreed upon by the parties, and the whole thereof, now on file in the office of the Clerk of the United States District Court, for the Southern District of New York, and that said Clerk may so certify the same; and it is

FURTHER STIPULATED that the filing of a praecipe under United States Equity Rule 75 be and the same is hereby waived.

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Dated, New York, July 8<sup>th</sup>, 1924.

HIRSCH, SHERMAN & LIMBURG,  
Solicitors for Complainant-Appellant.

WILLIAM HAYWARD *W. J. C. C. C.*  
Solicitor for Defendants-Appellees.

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**Clerk's Certificate.**

UNITED STATES OF AMERICA,  
SOUTHERN DISTRICT OF NEW YORK, } ss.:

MAX HENKELS,  
Complainant,

against

THOMAS W. MILLER, as Alien  
Property Custodian, and  
FRANK WHITE (substituted  
for Guy S. Allen), as Treas-  
urer of the United States of  
America,

Defendants.

In Equity  
No. 21-108.

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I, ALEXANDER GILCHRIST, JR., Clerk of the Dis-  
trict Court of the United States of America for the  
Southern District of New York, DO HEREBY CERTIFY  
that the foregoing is a correct transcript of the rec-  
ord of the said District Court in the above entitled  
matter, as agreed by the parties.

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IN TESTIMONY WHEREOF, I have caused the seal  
of the said Court to be hereunto affixed at the City  
of New York, in the Southern District of New  
York, this *5<sup>th</sup>* day of July, in the year of our  
Lord one thousand nine hundred and twenty-four  
and of the Independence of the United States of  
America the one hundred and forty-eight *ninth*,

(Seal)

ALEX. GILCHRIST, JR.,  
Clerk.



IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

Before Hon. Charles M. Hough, Hon. Martin T. Manton, Circuit  
Judges; Hon. Augustus N. Hand, District Judge

MAX HENKELS, Appellant,

vs.

THOMAS W. MILLER, as Alien Property Custodian, and FRANK  
WHITE, as Treasurer of the United States, Appellees

Appeal from a Final Order Entered in the District Court for the  
Southern District of New York

OPINION

Henkels brought suit under Section 9 of the Trading with the Enemy Act, (40 Stat., 419,) alleging in substance that the Custodian had seized and retained possession of certain shares of stock belonging to him individually and issued by a domestic incorporated Company. Henkels was and is a citizen of the United States.

The principal issue resolved at trial was that the stock so seized did belong absolutely to plaintiff Henkels and was not, as contended by the Custodian, property of the enemy copartnership in which Henkels had admittedly a partner's interest. Prior to the filing of the bill the Custodian had sold the shares of stock so seized and paid over the net proceeds of sale to the Treasurer of the United States. After trial a decree was entered specifically directing the defendant Treasurer "to account for and pay over to the complainant (Henkels) the proceeds of the sale of the said (stock) now in his possession or custody, together with the income or interest if any earned thereon".

It was agreed between the parties that the United States Treasurer had in his possession as the net remaining proceeds of the sale of Henkels' stock, the sum of \$873,776.28.

The decree above referred to was entered 6th July, 1921. During the ensuing six months or thereabouts efforts were made by Henkels' attorney to recover not only this admitted sum, but the "income or interest earned thereon" by said Treasurer and/or the Custodian.

It is now agreed that the Custodian never received any dividends on the stock prior to sale. Whatever profits or advantages resulted to anyone from the stock or its proceeds arose because in compliance with Section 12 of the Act, (40 Stat., 423,) the Secretary of the Treasury had invested most of all the moneys realized from sales of property seized by the Custodian, in the securities of the United States yielding interest. There was never any such investment of the specific sum obtained from the sale of Henkel's stock or any other particular lot of seized property. Nor had the Secretary invested all the money so received by him from the Custodian, because there was kept on hand a cash balance of approximately Five million dollars at all times to provide for obvious possible contingencies.

But from the investment of the major portion of the moneys realized from Custodian's sales there had accrued in the Treasury of the United States prior to March 4, 1923, the sum of Twenty-seven million dollars. (Document No. 10, Senate 68th Congress, 1st Session.)

To some equitable portion of this income, interest or increment Henkels laid claim under the decree above recited.

The defendants, through the Attorney General of the United States, refused to pay anything but the above admitted principal, viz: \$873,776.28, and Henkels, for business reasons, finally executed and delivered a receipt and release in consideration of that sum on which an order satisfying the aforesaid decree of record was entered in the Court below January 10, 1922.

On becoming aware of the very great profits accruing to the United States Treasury by the investment of funds produced by Custodian's sales, plaintiffs moved in the Court below to be relieved of the release as above stated by Henkels, and to have the order of satisfaction set aside on the ground that the same had been obtained by duress and to the end that application might be made for a Master to ascertain what income or interest had been obtained by defendants or either of them from the use and investment of the fund which contained Henkels' \$873,776.28.

This motion the Court denied, and from the order of denial this appeal was taken by complainant.

Herbert R. Limburg for Henkels-appellant;

Dean Hill Stanley, Special Assistant to the Attorney-General, opposed.

HOUGH, C. J.:

This bill presents two questions: 1st. Can appellant, by his plea of duress, be relieved of the receipt and release executed by him? And, 2d, if such relief be granted, could he recover any more than he has received in this litigation?

Some other matters have been discussed arising out of an inquiry whether the decree of July, 1921, was final or interlocutory. To this question we shall pay no attention. It is a mere matter of detail, and the vitals of the case are plain enough.

Of the two questions above stated we prefer to consider the second, for however interesting the question of duress may be, considering the trend of modern decisions, a judgment here favorable to appellant would leave the second question undetermined, while the second question, if decided adversely to appellant, disposes so far as we are concerned of the whole matter.

Appellant's proposition is that the Custodian became a trustee for Henkels in respect of this stock and its proceeds. It is now adjudicated that there was never any right to seize the stock, wherefore the Custodian must respond, like any other trustee who has made profit out of the fund for which he is held ultimately responsible.

It is undoubtedly true that in a certain sense the Custodian is a trustee. He is called by that name in the 12th section of the Act

(40 Stat., 423), and he has called attention to his trusteeship for the public at the bar of this and many other Courts.

But if appellant's theory of attack be considered closely it is clear that the trusteeship that he invokes as against the Custodian is one arising *ex maleficio*. It is a trusteeship created by a wrong; and that wrong was a seizure of property belonging to an American citizen and unaffected by enemy ownership.

The niceties of the law of torts have not been and cannot be strictly regarded in statutes passed under the stress of war and designed to meet war conditions.

As the Court said in *Stoehr vs. Wallace*, 255 U. S., 239, at page 245: "What Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy owned if adequate provision be made for a return in case of mistake is not debatable." And what shall be "adequate provision" is for the Congress to declare.

That mistakes would be made under this Act was undoubtedly contemplated, and the Act itself declared in the amendment of November 4, 1918 (40 Stat., 1020)—"That the sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed \* \* \* to the Alien Property Custodian \* \* \* or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property \* \* \* shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States." This means in substance that persons in the position of Henkels have no remedy except under Section 9 of the act, and under that section the amendment just referred to limited recovery to the "net proceeds" received from the property involved.

Again it is to be observed that appellant's contention and any holding of the Custodian to the liabilities of a trustee *ex maleficio* is opposed certainly to the spirit and we think to the letter of subdivision c of Section 7 of the statute (40 Stat., 418) declaring that "no person shall be held liable in any Court for or in respect to anything done or omitted in pursuance of any order, rule or regulation made by the President under the authority of this act." And the actions of the Custodian even when he makes mistakes are and always were pursuant to such presidential rule.

Again, in whatever trusteeship the Custodian functions, the statute (Sec. 12, 40 Stat., 423) confines his office to "property other than money." As to money he is compelled to pay that forthwith into the Treasury of the United States, and the Congress in so many words has refused to him in respect of money the position of trustee.

Tested by ordinary legal formulæ the exact standing of the Custodian is difficult of definition when the various descriptions of his duties, privileges and responsibilities prescribed by statute are considered together. But this much is we think clear, that it can never be said that by reason of conduct such as occurred in this case of Henkels the Custodian became a trustee for Henkels in the same sense that he would have become a trustee under a deed *inter partes*, or by reason of an actionable wrong.

There is a technical reason why under this decree Henkels can never succeed in holding the Custodian to the position of a trustee: it is that the decree for money and for an accounting for money runs against the Treasurer of the United States only.

But this objection goes deeper than a mere technicality, it is a recognition in and by the decree of the fact that when the Custodian sold Henkels' stock and paid the proceeds into the Treasury, he lost control of the money; it became like any other money in the Treasury of the United States and there subject to congressional action in respect thereof.

The only reason why the decree could in any way operate against the Treasurer of the United States or the Secretary of the Treasury is Section 9 of the statute, the authority of the court below to affect the Treasurer with the decree depended upon that statute alone.

Remembering the admission that no dividends ever accrued upon this stock, the sole question now becomes this: Can the United States be compelled to pay to Henkels whatever gain it has made out of handling Henkels' money while it was in the Treasury?

We pay no attention to the difficulty of allocating any special gain to this special fund; let it be supposed that that could be done; the question remains whether under existing law the United States is under compulsion to admit Henkels to a share of that property.

Thus the matter becomes the old one of allowing interest against the United States.

It is sought to justify such recovery here by analogy to cases of condemnation of lands or other property for private use. The theory of all such well considered decisions is that since no American Government can take private property for public use without making just compensation—and just compensation includes reasonable interest for delay in payment of amounts awarded—therefore interest should be allowed. The matter is summarily put by Brandeis, J. in *United States vs. North American, etc. Co.*, 253 U. S., 330, at page 334.

But entirely apart from the argument above stated and based upon the language of the statute, there is no resemblance between the war measure of seizing property "believed to be enemy owned" and condemning or otherwise appropriating private property for a public use. We think the difference too obvious to require further discussion.

The general proposition affecting this litigation is accurately stated in the syllabus of *United States vs. North Carolina*, 136 U. S., 211, viz.: that no sovereign is "liable to pay interest on its debt unless its consent to do so has been manifested by an act of its legislature or by a lawful contract of its executive officers." And the matter was again put in most general terms as to all sovereigns in *United States vs. New York*, 160 U. S., 598, at page 619.

So far as citations gain importance by similarity of facts, we remain of opinion, despite strenuous argument contra, that the decision in *United States ex rel. Angarica vs. Bayard*, 127 U. S., 251, presents an almost perfect analogy to the present litigation. There as here the United States Treasury lawfully received moneys, which moneys were lawfully due to one who was apparently a citizen of the United States. There the reason for withholding was a doubt as to

what would be the net proceeds after deduction of expenses. Here the reason for withholding was a doubt as to legal ownership; but in both cases the United States earned money by investing the withheld funds in its own securities. The Supreme Court, by applying the well known doctrine above cited refused to permit Angarica to collect the profit made by the United States.

The law has not changed, and we would be unable to award to Henkels any portion of the money that the United States has acquired by investing his money.

We must and do hold that under the circumstances now revealed, so much of the decree of July, 1921, as required the Treasurer of the United States to pay anything more than the "net proceeds" which Henkels has already received was unlawful. He never could have gotten anything, even if there had never been a receipt and release executed. Consequently the order appealed from is affirmed. No costs.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the Southern  
District of New York

JUDGMENT—Jan. 12, 1925

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

C. M. H. M. T. M.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

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IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

To the Honorable the Judges of the United States Circuit Court  
of Appeals for the Second Circuit:

Now comes the above named appellant, Max Henkels, by Morris J. Hirsch, his counsel, and feeling himself aggrieved by the order of this Court entered on the 12th day of January, 1925, affirming the decree of the United States District Court for the Southern District

of New York entered on the 23rd day of May, 1924, doth hereby pray that an appeal may be allowed to him from said order to the Supreme Court of the United States for the reasons specified in the assignments of error which are filed herewith, and that a transcript of the record, proceedings and papers upon which said order of this Court was made, duly authenticated, be sent to the Supreme Court of the United States.

And said appellant further says that this is a case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the United States Judicial Code and that the of the United States.

Dated New York, February 20, 1925.

Morris J. Hirsch, Counsel for Appellant. Hirsch, Sherman & Limburg, Solicitors for Appellant, 160 Broadway, Manhattan, New York City.

The foregoing appeal is hereby allowed; bond \$250.00.

Dated New York, February 27, 1925.

C. M. Hough, U. S. Circuit Judge.

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#### IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

#### ASSIGNMENT OF ERRORS

Now comes the appellant, Max Henkels, by Morris J. Hirsch, his counsel, and says that the order of this Court in the above entitled appeal entered on the 12th day of January, 1925, is erroneous and that in the record and proceedings and in the order aforesaid manifest error has intervened to the prejudice of said appellant, as follows, to wit:

1. This Court erred in affirming the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924.
2. This Court erred in not reversing the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924.
3. This Court erred in not reversing the decree of the United States District Court for the Southern District of New York in the above entitled cause, which had been entered on the 23rd day of May, 1924, and in not remanding this cause to said District Court, with instructions to grant to appellant, the plaintiff in said District Court, the relief prayed for in the plaintiff's notice of motion dated March 20th, 1924.
4. This Court erred in affirming the said decree of the District Court which had denied the application of the appellant which was embraced in the appellant's notice of motion dated March 20th, 1924.

5. This Court erred in affirming the said decree of the District Court which had been equivalent to the dismissal, upon pleadings and proofs, of a supplemental bill of complaint for the same relief as that sought by appellant's motion and prayed for in his notice of motion dated March 20th, 1924.

6. This Court erred in affirming the said decree of the District Court which had refused to grant to appellant any relief in this cause.

7. This Court erred in affirming the said decree of the District Court which had refused to name a master to take and state the account of the defendants, as directed by the decree of July 6th, 1921, for the income or interest, if any, earned on the proceeds of the sale of the property mentioned in said decree.

8. This Court erred in affirming the said decree of the District Court which had refused to direct that the accounting directed in and by said decree of July 6th, 1921, should now proceed.

9. This Court erred in affirming the said decree of the District Court which had refused to vacate or set aside so much of the order of January 10th, 1922, for satisfaction of the said decree of July 6th, 1921, and warrant for satisfaction thereto annexed, acknowledged the 30th day of December, 1921, and whereon the said order was entered, as satisfies or purports to satisfy said decree of July 6th, 1921, with reference to defendant's duty to account for the income or interest, if any, earned or accrued.

10. This Court erred in affirming the said decree of the District Court which had refused to decree that said warrant for satisfaction of decree and receipt or release, in so far as the same apply to the interest or income mentioned in said decree of July 6th, 1921, were delivered by appellant to appellees involuntarily and under duress.

11. This Court erred in ruling and holding, for the purpose of affirming the decree of the District Court entered May 23rd, 1921, that there was error in so much of the decree of the District Court entered July 6th, 1921, and now sought to be enforced, as is comprised in the words "together with the income or interest, if any, earned thereon."

Wherefore, the said appellant prays that said order of the United States Circuit Court of Appeals for the Second Circuit entered in this cause on the 12th day of January, 1925, be reversed and that the said Court may be directed to enter an order reversing the said decree of the United States District Court for the Southern District of New York entered in this cause on the 23rd day of May, 1924, and directing said District Court to enter a decree in accordance with the prayer of said notice of motion.

Dated New York, February 20th, 1925.

Morris J. Hirsch, Counsel for Appellant. Hirsch, Sherman & Limburg, Solicitors for Appellant, 160 Broadway, Manhattan, New York City.



BOND ON APPEAL FOR \$250—Approved and filed Feb. 27, 1925;  
omitted in printing

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IN UNITED STATES CIRCUIT COURT OF APPEALS

CLERK'S CERTIFICATE

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 83 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Max Henkels, plaintiff-appellant, against Thomas W. Miller, as Alien Property Custodian, and another, defendants-appellees, as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 28th day of February in the year of our Lord One Thousand Nine Hundred and twenty-five and of the Independence of the said United States the One Hundred and forty-ninth.

Wm. Parkin, Clerk. (Seal of the United States Circuit Court of Appeals, Second Circuit.)

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CITATION—In usual form, showing service on Wm. Hayward;  
omitted in printing

Endorsed on cover: File No. 30,959. U. S. Circuit Court of Appeals, Second Circuit. Term No. 318. Max Henkels, appellant, vs. Thomas W. Miller, as Alien Property Custodian, and Frank White, as Treasurer of the United States of America. Filed March 17th, 1925. File No. 30,959.